A

KHIDMAS CAPITAL SDN BHD & ANOR

v.

NRB HOLDINGS LTD & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AZMEL MAAMOR JCA
MOHD NOOR ABDULLAH JCA
[CIVIL APPEAL NOS: W-04-402-2004,
C W-04-383-2005 & W-04-907-2005]
13 MARCH 2006

CIVIL PROCEDURE: *Injunction - Mareva injunction - Appeal against grant of injunction freezing assets of defendants - Dissipation of*
D *assets - Whether there was non-disclosure of material facts by plaintiff - Whether decision to grant injunction correct*

These were three appeals, all arising from a Mareva or freezing injunction granted by the High Court, against the grant of the
E order *ex parte*, against the dismissal of the defendants' application to set aside the injunction and against the refusal of the judge to vary the terms of the injunction, respectively. By consent, the parties agreed to go forward on the appeal directed against the grant of the assets-freezing injunction. The defendants attacked the
F freezing order on two grounds. Firstly, that there was no urgency in the matter warranting the making of the order because: (i) there were negotiations afoot between the parties; (ii) this was not a case where the defendants had engaged the plaintiff in negotiations while quietly dissipating its assets; and (iii) the plaintiff
G had, in any event, already obtained an order restraining the first defendant from disposing of the shares that were the primary target of the plaintiff's claim. Secondly, that there had been non-disclosure of material facts by the plaintiff *ie*, the plaintiff deliberately failed to disclose to the judge at the *ex parte* stage that
H the parties were in the process of negotiating, which was a material fact that would have led a reasonable tribunal to refuse to entertain the *ex parte* application.

I

Held (dismissing the appeals)
Per Gopal Sri Ram JCA:

(1) On the facts and evidence, there were sufficient grounds for the plaintiff to fear a dissipation of assets warranting the making of an urgent application for the freezing order in this case. (para 7)

(2) Upon examination of the evidence, there was really nothing in the complaint about non-disclosure. It was crystal clear from the documents that all negotiations between the parties were conducted after the freezing order had been obtained. The evidence relied on by the appellant as showing that there had been negotiations pre-dating the freezing order was vague and imprecise. A reasonable tribunal properly directing itself would have given that evidence no weight whatsoever and this was something well within the province of the learned judge in this case. The plaintiff had made out an unusually sharp and clear case for the grant of a freezing order. In the circumstances, the learned judge was correct in granting the freezing order and in refusing to set aside or to vary it. The appeals were devoid of any merit. (paras 10 & 11)

Bahasa Malaysia *translation of headnotes*

Ketiga-tiga rayuan di sini, yang berbangkit dari injunksi pembekuan atau Mareva, adalah masing-masingnya terhadap pemberian perintah *ex parte* injunksi tersebut, terhadap penolakan permohonan defendan untuk membatalkan injunksi tersebut dan terhadap keengganan hakim untuk meminda terma injunksi tersebut. Atas persetujuan bersama, pihak-pihak bersetuju untuk meneruskan dengan rayuan berkaitan pemberian injunksi yang membekukan aset tersebut. Defendant mencabar perintah pembekuan berdasarkan dua sebab. Pertama, bahawa tidak wujud keadaan kecemasan yang menuntut pemberian injunksi memandangkan: (i) pihak-pihak masih lagi dalam perundingan; (ii) ini bukan kes di mana defendan berunding dengan plaintif sambil melupuskan aset-asetnya; dan (iii) plaintif telah pun memperoleh perintah menghalang defendan dari melupuskan saham-saham yang menjadi perkara pokok tuntutan plaintif. Kedua, bahawa terdapat kegagalan di pihak plaintif untuk mendedahkan fakta material, yakni plaintif dengan sengaja gagal mendedahkan kepada hakim di peringkat *ex parte* bahawa pihak-pihak masih dalam proses perundingan, yang mana, jika didedahkan, boleh menyebabkan tribunal yang munasabah enggan melayani permohonan *ex parte* tersebut.

Diputuskan (menolak rayuan-rayuan)
Oleh Gopal Sri Ram HMR:

(1) Berdasarkan fakta dan keterangan, tidak terdapat alasan mencukupi untuk plaintif merasa bimbang bahawa aset-aset akan dilupuskan bagi mewajarkannya membuat permohonan kecemasan untuk mendapat perintah pembekuan di sini.

(2) Meneliti keterangan yang wujud, rungutan mengenai ketidakdedahan adalah tidak berasas sama sekali. Dokumen-dokumen jelas menunjukkan bahawa perundingan hanya dijalankan selepas perintah pembekuan diperolehi. Keterangan yang digunapakai perayu bagi menunjukkan bahawa rundingan telah berjalan sebelum perintah diperolehi adalah kabur dan tidak menyakinkan. Sebuah tribunal yang munasabah, dengan mengarahkan dirinya secara betul, tidak mungkin akan memberikan sebarang pertimbangan kepada keterangan sedemikian, dan ini jelas termasuk dalam bidang tugas yang arif hakim dalam kes di sini. Plaintif telah membuktikan suatu kes yang amat nyata dan kukuh untuk pemberian perintah pembekuan. Dengan demikian, yang arif hakim betul apabila membuat perintah pembekuan dan enggan menolak atau meminda perintah tersebut. Rayuan-rayuan adalah tidak bermerit.

Case(s) referred to:

Bloch v. Bloch [1981] 37 ALR 55 ***(refd)***
Collier-Garland (Properties) Pty Ltd v. Northern Transport Co Pty Ltd [1964] 82 (NSW) WN (Pt 1) 125 ***(refd)***
Dinsdale v. R [2000] 202 CLR 321 ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
House v. The King [1936] 55 CLR 499 ***(refd)***
Keet Gerald v. Mohd Noor Abdullah [1995] 1 CLJ 293 CA ***(refd)***
Lovell v. Lovell [1950] 81 CLR 573 ***(refd)***
Maxwell v. Keun [1928] 1 KB 645 ***(refd)***
Mohamed Zainuddin Puteh v. Yap Chee Seng [1978] 1 MLJ 40 ***(refd)***
Rodgers v. Rodgers [1964] 114 CLR 608 ***(refd)***
Sari Artists Film Productions Sdn Bhd v. Malaysia Film Industries Sdn Bhd [1974] 1 MLJ 123 ***(refd)***
Uttar Pradesh Co-operative Federation Ltd v. Sunder Bros AIR [1967] SC 249 ***(refd)***
Walker v. Walker [1967] 1 WLR 327 ***(refd)***

For the appellants - Raja Abdul Aziz Addruse (TS Lim with him); M/s Chooi & Co

For the respondent - Loh Siew Cheang (P Gananathan, Olivia Loh & Kelvin Seet with him); M/s Bodipalar Ponnudurai Nathan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D7-22-1909-2003]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] There are three appeals before us. They all arise from a Mareva or freezing injunction granted by the High Court. One is directed against the grant of the order *ex parte*; the other is against the dismissal of the defendants' application to set aside the injunction; the third is against the refusal of the judge to vary the terms of the injunction. By consent the parties agreed to go forward on the appeal directed against the grant of the assets-freezing injunction. But let me first say a few words about the factual matrix against which these appeals lie.

[2] The plaintiff (respondent before us) is a South African company. It is in liquidation. Its liquidator has brought this action in its name for the recovery of certain shares worth several million ringgit which belong to it. The crux of the plaintiff's claim is that the shares were moved out of the plaintiff's hands and into the hands of the first defendant (first appellant before us) by one Dato' Samsudin bin Abu Hassan, the second defendant (the second appellant before us) who at all material times stood in a fiduciary position *vis a vis* the plaintiff. There is also an assertion that the first defendant is the alter ego of the second defendant. The method or process invoked by the plaintiff is the equitable right in the beneficial owner of property to trace that property into the hands of a third party. The primary remedy that has been sought is a declaration. The plaintiff became afraid that the first defendant would dissipate its assets it owns across the globe to frustrate any judgment that may be obtained. So, it moved *ex parte* for an injunction freezing the defendant's assets worldwide. The judge who heard the plaintiff's summons granted the order. Later, he refused to set aside that order or to vary it.

[3] The learned judge did not, however, produce any written reasons for his decision. This greatly hampered our task. For, as an appellate court in a matter such as this which involves the exercise of discretion our initial function is one of review only. We do not possess any original discretion. It is not our function to undertake a study of all the affidavits and exhibits filed in the court below to arrive at a conclusion as to how each of us in this court would have exercised the discretion and then to see if our view matches that of the judge at first instance.

[4] The law on the point is clear and beyond argument. It is for an appellant to demonstrate that the High Court – the repository of the original discretion – did not exercise it in accordance with law. That is to say, that it did not take into account relevant considerations or took into account irrelevant considerations or asked itself the wrong question or misinterpreted a provision of written law. Further, even if the precise nature of the error is not discoverable, it is sufficient for an appellant to demonstrate that the result arrived at by the judge is so unreasonable or plainly unjust so that we may infer that there has been a failure properly to exercise the discretion. See, *House v. The King* [1936] 55 CLR 499 at 504-505; *Lovell v. Lovell* [1950] 81 CLR 573 at 532-534; *Rodgers v. Rodgers* [1964] 114 CLR 608 at 619-620; *Dinsdale v. R* [2000] 202 CLR 321. Lastly, even if an appellant is unable to bring home any of the foregoing matters, we are nevertheless under a duty to review the order made and to intervene if we are satisfied that there has been an injustice to one of the parties as a result of the judge's exercise of discretion. See, *Maxwell v. Keun* [1928] 1 KB 645 at 653; *Walker v. Walker* [1967] 1 WLR 327 at 330; *Collier-Garland (Properties) Pty Ltd v. Northern Transport Co Pty Ltd* [1964] 82 (NSW) WN (Pt 1) 125 at 127; *Bloch v. Bloch* [1981] 37 ALR 55 at 58-59.

[5] For completeness I refer to *Uttar Pradesh Co-operative Federation Ltd. v. Sunder Bros* AIR [1967] SC 249 where Ramaswami J when delivering the judgment of the Indian Supreme Court said:

> In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial

> manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well established ...

[6] It must therefore be appreciated that we cannot properly exercise our appellate function without having before us the High Court's reasons for exercising its discretion in the way in which we did. To say this is not a failure on our part to realise the burden of the heavy workload that judges of the High Court bear, faced as they are by appeals against almost all the orders they make. In such circumstances it is unrealistic to require them to produce detailed reasoned judgments such as those written after a full trial in a witness action. That is not what we expect of them. In *Keet Gerald v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293, this court recognised that all that is required of judge hearing an application for an injunction is to briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion as to where the balance of the justice of the particular case lies.

[7] In the present instance, learned counsel for the defendants attacked the freezing order on two grounds. First, that there was no urgency in the matter warranting the making of the order; and second that there had been non-disclosure of material facts by the plaintiff. As for the first ground, it was urged that there was nothing urgent warranting the making of an application because (i) there were negotiations afoot between the parties; (ii) this was not a case where the defendants have engaged the plaintiff in negotiations while quietly dissipating its assets; and (iii) the plaintiff had, in any event already obtained an order restraining the first defendant from disposing of the shares which were the primary target of the plaintiff's claim. In answering this submission, learned counsel for the plaintiff took us through documentary evidence in the appeal record that reasonably supports a want of good faith and forthrightness on the part of the defendants. Having considered the facts and evidence very carefully, this court was

satisfied that there were sufficient grounds for the plaintiff to fear a dissipation of assets warranting the making of an urgent application for the freezing order in this case.

[8] Now for the second ground. The main criticism here is that the plaintiff deliberately failed to disclose to the judge at the *ex parte* stage that the parties were in the process of negotiating. This is indeed a material fact which, if disclosed, would have led a reasonable tribunal to refuse to entertain the *ex parte* application. The failure to disclose such a fact as this has serious consequences. And all that I need do is to quote from the judgment of Hashim Yeop A Sani J (as he then was) in *Sari Artists Film Productions Sdn Bhd v. Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123 where that very learned judge said:

> The granting of an injunction is a discretion of the court. It is essential that the party asking the court to exercise its discretion makes available to the court all facts which might be material for the consideration of the court before exercising its discretion. In *Clifton v. Robinson* 16 Beav 355; 51 ER 816, it was held that the fact that the plaintiff had forgotten the circumstance was no excuse for the suppression of a material fact in an application for an *ex parte* injunction. In *Hilton v. Lord Granville* 4 Beav 137; 49 ER 290, the Master of the Rolls (Lord Langdale) succinctly described the duty of the plaintiff when asking for an injunction:
>
> > The rights asserted on the part of the plaintiff and of the defendant are legal rights; and the plaintiff, asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to shew that the right has been established, or that, having had no means of establishing it, but the right being prima facie well founded, the interference of this court is necessary, to prevent that species and extent of mischief, which this court calls irremediable, before the right can be established by legal proceedings. In this case, it appears that the plaintiff, personally, has not had any opportunity of establishing his right at law; and, therefore, the question is, what is the result of the evidence now adduced, as to the right which he claims, and as to the nature and extent of damage, with which he is threatened, if his claim of right appears to be well founded.
>
> It was held that where a plaintiff, upon an application for an *ex parte* injunction, suppresses material facts, the injunction will bee dissolved on that ground alone.

[9] The same learned judge in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40 said this: A

> The sole ground on which the Notice of Motion is based is of course as set out in paragraph (a) of the defendant's affidavit, that is to say, that the plaintiff had not stated the facts fully and accurately and that the plaintiff had not disclosed all material facts. It is an established law that the court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did not mean to deceive the court and that the court is bound to maintain the principle that those who come "asking *ex parte* for injunctions must proceed with the highest good faith, and keep back no material facts." – see *Schmitten v. Faules* [1893] WN 64. This standard has been maintained strictly and it was even held that when a party comes for an injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for *ex parte* injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved – see *Daglish v. Jarvie* [1851] 20 LJ Ch 475.

B C D E

[10] Having examined the evidence we were satisfied that there was really nothing in the complaint about non-disclosure. It is crystal clear from the documents that all negotiations between the parties were conducted after the freezing order had been obtained. The evidence relied on by the appellant as showing that there had been negotiations pre-dating the freezing order is vague and imprecise. A reasonable tribunal properly directing itself would have given that evidence no weight whatsoever. And this is something well within the province of the learned judge in this case. See, *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 where the Privy Council approved the rejection by the first instance judge in an interlocutory proceeding of vague and imprecise assertions. F G

[11] Having regard to the material that had been placed before the learned judge as well as the argument before this court, my learned brothers and I were of the unanimous view that the plaintiff had made out an unusually sharp and clear case for the grant of a freezing order. In the circumstances, the learned judge was correct in granting the freezing order and in refusing to set H I

A aside or to vary it. The appeals were devoid of any merit and were dismissed with the usual consequential orders that follow a dismissal.

[12] My learned brothers Azmel bin Haji Maamor and Mohd
B Noor bin Abdullah, JJCA have seen this judgment in draft and have expressed their agreement with it.

C

D

E

F

G

H

I